MARY SEMONE

IBLA 76-309 Decided August 11, 1980

Appeal from the decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application, F-15008.

Affirmed in part, set aside and remanded in part.

1. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Rules of Practice: Hearings

   Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for allotment.

APPEARANCES: Carmen Massey, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Mary Semone appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 9, 1975, rejecting her Native allotment application, F-15008.

On January 6, 1972, BLM received appellant's Native allotment application and evidence of use and occupancy for approximately 160 acres of land on the Innoko River. The application is for two separate parcels of land each containing 80 acres, identified as parcels A and B. Appellant asserts that the sites have been used seasonally since 1967 for hunting, fishing, and trapping.

A BLM field examination of the land embraced in appellant's application was conducted on June 21, 1974. The field report for parcel A concluded that there was no evidence of occupancy or use of the parcel. The report noted that the examiner spoke with appellant who said that she did hunt, fish, trap, and pick berries on the land. The report noted that parcel A is well suited for the claimed uses of the land. The field examination for parcel B noted evidence of use and occupancy consisting of several fire pits and fish nets.

By letter of April 28, 1975, BLM notified appellant of the results of the field examination. The letter states that parcel B, with the exception of a small portion, lies within an airport lease application filed by the State of Alaska on July 12, 1962. The letter concluded that the filing of the airport lease application 1/ segregated parcel B from appropriation. 2/ Appellant was allowed 60 days to submit additional evidence in support of the application.

In response, appellant submitted her own affidavit and a witness statement pertaining to use and occupancy of parcel B. A second witness statement, apparently directed at both parcels, was also submitted.

By decision dated September 9, 1975, BLM rejected appellant's application because appellant had not presented clear and credible evidence of her entitlement to an allotment for parcel A, and parcel B was segregated from all forms of appropriation since the filing of airport lease application F-030058 on July 12, 1962.

The Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), 3/ and the implementing regulations 43 CFR Subpart 2561 authorize the Secretary of the Interior to allot to Alaska Natives not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral lands in Alaska for which the Alaska Native can show the required 5 years substantially continuous use and occupancy.

1/ The airport lease was issued effective January 1, 1965.

2/ The then governing regulation, 43 CFR 251.14 (1962), provided in part as follows:

"§ 251.14 Segregation of land by application for lease; airport withdrawals which may be made by the Bureau of Land Management. * * * [A]n application for a lease of not exceeding 2,560 acres of public lands for a public aviation field under sections 1, 2, and 3 of the act of May 24, 1928 (45 Stat. 728, 729; 49 U.S.C. 211-213), will operate as a segregation of the lands described therein from the time such application is filed in the proper land office, * * *."

3/ The Alaska Native Allotment Act was repealed, subject to pending applications, by section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976).

43 CFR 2561.0-3, 43 CFR 2561.2. Such use and occupancy

> contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use. [Emphasis added.]

43 CFR 2561.0-5(a).

[1] In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit ruled that where issues of material fact are in dispute in Native allotment cases, due process requires that

> applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d at 143.

Following that decision, the Board ruled that the Departmental contest procedures, 43 CFR 4.451-1 to 4.452-9, would satisfy the requirements of due process. Thus, when BLM adjudicates a Native allotment application presenting a factual issue as to the applicant's compliance with the use and occupancy requirements, BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-42, 83 I.D. 308, 311-12, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). The Ninth Circuit Court of Appeals has since held that the Departmental contest procedures would satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe, supra. See Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Appellant's assertions of use and occupancy in her application and her statement of such use to the field examiner create issues of material fact regarding her use and occupancy of parcel A. Accordingly, we will remand this case and direct that BLM initiate contest proceedings directed to establishing the nature of appellant's use and occupancy of parcel A.

The portion of the decision relating to parcel B does not raise a factual issue and is not addressed by appellant in her statement of

reasons. Appellant does not contend that her use and occupancy of parcel B predates the segregation of the land from appropriation, nor does appellant challenge the validity of the State's airport lease. As to parcel B, there are no material facts in dispute and the disposition of parcel B is controlled by applicable law. The decision as to parcel B does not fall within the ambit of the rule in Pence v. Kleppe, supra, and no hearing is necessary. Andrew Petla, 43 IBLA 186, 196 (1979); Herman Anderson, Jr., 41 IBLA 296, 300 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the portion of the decision pertaining to parcel B is affirmed. The portion of the decision pertaining to parcel A is set aside and remanded for initiation of contest proceedings.

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Frederick Fishman
Administrative Judge

We concur:

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Douglas E. Henriques
Administrative Judge

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Anne Poindexter Lewis
Administrative Judge